

**BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF :)
)
,)
)
 Petitioner)
v.)
)
ROCK PORT R-II SCHOOL DISTRICT,)
)
 Respondent)
)
 COVER SHEET

1. (“Student”) is the daughter of (“Parents”). Student was born on . Student’s School Number is .
2. At all times material to this due process proceeding, Student resided with her Parents in the Rock Port R-II School District (“District”).
3. The Student and Parents were not represented at the hearing.
4. The District was represented by:

Peter G. Yelkovac
Tueth Keeney Cooper Mohan & Jackstadt
425 S. Woods Mill Road, Suite 300
St. Louis, Missouri 63017
5. Student’s Mother requested due process by letter to the Department of Elementary and Secondary Education (“DESE”) dated June 10, 2003 which was received by DESE on June 10, 2003. The original deadline for mailing the decision in this matter was July 25, 2003.
6. The District requested an extension of the time lines through October 31, 2003 by letter dated July 2, 2003. The Hearing Chairperson extended the time lines to October 31, 2003 by letter dated July 2, 2003.
7. The hearing in this matter was conducted on October 6 and 7, 2003 in Rock Port, Missouri.

**BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF :

“STUDENT”

Petitioner

v.

ROCK PORT R-II SCHOOL DISTRICT,

Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER**

The Hearing Panel, after conducting the due process hearing in this matter on October 6 and 7, 2003 issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties

1. The Student and her Parents currently reside in Rock Port, Missouri within the boundaries of the Rock Port R-II School District (“District”). The Student is profoundly deaf. Her primary language and mode of communication is American Sign Language (“ASL”) and gestures.
2. The Parents are literate and their primary mode of communication is spoken English.
3. The District is a Missouri school district organized pursuant to Section 162.211 *et seq.* RSMo.
4. The Student and Parents were not represented by counsel at the hearing. The Parents were provided with a list of low cost legal services and a Missouri Bar Association referral brochure by DESE. (HP Exh 2). Prior to the hearing the Student’s Parents were provided with *The Procedural Safeguards for Children and Parents* by the Hearing Chairperson.
5. The District was represented at the hearing by Peter G. Yelkovic, Tueth Keeney Cooper Mohan & Jackstadt, 425 S. Woods Mill Road, Suite 300, St. Louis, Missouri 63017.

6. The Hearing Panel for the due process proceeding was:

Ransom A Ellis, III, Hearing Chairperson
Ms. Jean Adams, Panel Member
Ms. Marilyn Bohnsack, Panel Member

7. During all times relevant to this proceeding the following persons were employed by the District:

Richard Baldwin	Superintendent
Cynthia Baldwin	Principal
Mary Underhill	Special Education Case Manager
Laura Mangnall	Teacher

B. Procedural Background

8. On or about June 10, 2003, the Student's Mother sent a letter to the Missouri Department of Elementary and Secondary Education ("DESE") requesting a due process hearing. (HP Exh.

1) The request for the due process hearing was received by DESE on June 10, 2003.

9. On or about June 10, 2003, Ms. Pam Williams, Director for Special Education Compliance at DESE notified the Student's Mother (HP Exh. 2) that the request for due process had been received. This letter also provided the Parents with a list of low cost legal services and a Missouri Bar Association referral brochure by DESE and a copy of *Procedural Safeguards for Parents and Children*.

10. On or about June 23, 2003, Ms. Williams notified the Hearing Chairperson (HP Exh. 3) and the Hearing Panel Members (HP Exh. 4) that they had been selected to serve on the hearing panel for the Student's request for due process.

11. On or about June 23, 2003, the Hearing Chairperson provided the Student's Mother with a copy of the *Procedural Safeguards for Parents and Children* (HP Exh. 5). The Hearing Chairperson also notified the parties that the due process hearing had to be held, and a written decision rendered by July 25, 2003. (HP Exh. 6).

12. On or about July 2, 2003, Peter G. Yelkovic entered an appearance on behalf of the District. (HP Exh. 7) and requested that the time lines for the decision be extended. through October 31, 2003. (HP Exh. 7). On July 2, 2003, the Hearing Chairperson extended the time lines in this case to and through October 31, 2003. (HP Exh. 8).

13. On July 2, 2003, the Hearing Chairperson issued a Notice of Hearing setting this matter for hearing on September 15, 16 and 17, 2003, at 9 o'clock a.m. at the Administrative Offices of District in Rock Port, Missouri. (HP Exh. 9).

14. On July 8, 2003, the Student's Mother provided the Hearing Chairperson with written consent to speak to her parents ("Grandparents") concerning Student and the due process hearing. (HP Exh. 10).

15. On August 7, 2003, Student's Mother wrote the Hearing Chairperson requesting: (1) that Student's Grandfather be allowed to be the "spokesperson" for the Student and Parents during the due process hearing and prior to the hearing in this matter; and (2) that the location of the due process hearing be moved to another location. (HP Exh. 11). On August 11, 2003, a copy of this letter was provided to Mr. Yelkovic by the Hearing Chairperson. (HP Exh. 12). On August 22, 2003, District's Counsel opposed both requests made by the Student's Mother. (HP Exh. 14). On August 26, 2003, the Hearing Chairperson issued a Decision and Order Regarding Motions of Parents for Representation and Change of Hearing Location (Attached as "Appendix A") (HP Exh. 15) which denied both motions.

16. On September 9, 2003, District's Counsel requested that the hearing date be rescheduled to the week of October 6, 2003 due to a conflicting trial setting in the United States District Court for the Eastern District of Missouri. (HP Exh. 18).

17. On September 10, 2003, the Hearing Chairperson conducted a telephone conference with the Student's Mother and Peter Yelkovic, Counsel for the District. That same day the Hearing Chairperson confirmed the agreements made during the telephone conference in a letter to the parties. (HP Exh. 19).

18. On September 10, 2003, the Hearing Chairperson issued a First Amended Notice of Hearing setting this matter for hearing on October 6 and 7, 2003, at 9 o'clock a.m. on October 6, at the Administrative Offices of the District in Rock Port, Missouri. (HP Exh. 20).

19. On September 25, 2003, the District filed Respondent Rock Port R-II School District's Motion For Summary Judgment and Memorandum in Support Thereof with the Hearing Chairperson. (HP Exh. 21). On September 29, 2003, the Hearing Chairperson wrote the parties and indicated that District's Motion for Summary Judgment would be taken with the case. (HP Exh. 22).

20. Exhibits were introduced and received into evidence at the hearing. The parties stipulated to the authenticity of all exhibits. (Tr. pp. 6-7). The following documents were admitted and made a part of the record in this case: Hearing Panel Exhibits ("HP Exh") 1 through 22 (Tr. pp. 6-7); Parent's Exhibits ("P Exh.") pages 1 through 48;¹ (Tr. pp. 258-259); and, District's Exhibits ("R-Exh.") 1 through 68. (Tr pp.234-235).

21. The parties were given an opportunity to provide the Hearing Panel with a brief or written statement of position following the hearing. Neither party submitted a post-hearing brief.

¹ The District raised objections to pages 10-14 and 30-48 of the Parent's Exhibits on the basis of hearsay. These exhibits were never formally identified during the hearing. However, the parties stipulated to the authenticity of all exhibits. The subject documents appear to be notes taken by Shawn Hayes, an advocate employed by Missouri Protection and Advocacy Services. Mr. Hayes did not testify at the hearing. These documents were admitted into the record with the understanding that the Hearing Panel would determine their evidentiary weight, if any.

22. The record of the hearing was closed on October 7, 2003.

C. Time Line Information

23. On or about June 10, 2003, the Student's Mother sent a letter to the Missouri Department of Elementary and Secondary Education ("DESE") requesting a due process hearing. (HP Exh. 1) The request for the due process hearing was received by DESE on June 10, 2003. The initial time line for mailing the decision in this case was July 25, 2003.

24. On or about July 2, 2003, Counsel for the District requested that the time lines for the decision be extended. through October 31, 2003. (HP Exh. 7). On July 2, 2003, the Hearing Chairperson extended the time lines in this case to and through October 31, 2003. (HP Exh. 8).

25. The hearing was held in Rock Port, Missouri on October 6 and 7, 2003.

D. The Issues And Relief Requested

26. The parties stipulated that the following issues could be presented to the Hearing Panel:

Issue No. 1: Whether the School District has provided the Student with a free, appropriate public education since the Student was enrolled in the District on or about the beginning of school year 2001-02?

Issue No. 2: Whether the proper educational placement for the Student is at the Missouri School for the Deaf?

(Tr pp. 5-6).

27. At the hearing, the Parents requested the following remedies:

Remedy 1: Change the location of the Student's placement to a separate educational setting at the Iowa School for the Deaf ("ISD").

Remedy 2: Change the placement of the Student to a general education classroom in the Maryville R-II School District with the assistance of a sign interpreter.

(Tr pp. 129-130).

E. Background Facts

28. Prior to school year 1997-98, the Student attended a pre-school hearing-impaired, self-contained class at Sunset Acres Elementary School in Shreveport, Louisiana. (R Exh. 3, p. 8).

29. In the Spring of 1998, the Student and her Parents moved to Clarinda, Iowa which is located within the Shenandoah Community School District (“Shenandoah District”) in the State of Iowa. (R Exh. 3, p. 8).

30. On and around April 14, 1999, the Student was educationally evaluated by the staff at ISD. That evaluation set forth the following “Impressions and Recommendations”:

“[The Student] demonstrates a profound-to-complete sensorineural hearing loss for the right ear and a complete hearing loss for the left ear. She has normal middle ear function of the right ear, and her left ear exhibits evidence of a perforated tympanic membrane. Impressions based upon informal observations suggest that [the Student] will not receive much benefit from her personal amplification; however, until a reliable audiogram can be completed, she should continue to utilize her hearing aids. Amplification may be providing her with some awareness of very loud environmental sounds. It is recommended that [the Student’s] left hearing aid be repaired, and both earmolds may need to be replaced as she was experiencing feedback at volume control rotation 2.5 with no ear canal obstruction.

It is recommended that [the Student] continue to receive medical monitoring/intervention for her perforated left tympanic membrane. To help prevent infections, care should be taken to prevent water or other fluids from getting into her ear. Personal swim plugs can be made at her local audiologist’s or dispenser’s office, or over-the-counter silicone plugs (available at most drugstores) could be used. Although [the Student] has been seen with cotton in her ear to absorb the fluid trying to drain out of her ear, cotton is not recommended as an earplug as it absorbs fluid. This would draw water into the ear when she is swimming or bathing.

[The Student] should continue to be considered a manual communicator. It is also suggested that [the Student] be evaluated for difficulties with attention/focus.

An audiological evaluation should be performed again in the Fall to attempt gaining a reliable audiogram. Further recommendations may be made at that time. Hearing aid monitoring services will be available to [the Student] on an as-needed basis as well.”

(R Exh. 3, p. 9).

31. Following the Student’s evaluation by ISD, an Individualized Education Program (“IEP”) was developed for her. The IEP team which included the Student’s Mother, agreed that the appropriate placement for the Student was at ISD. Beginning in school year 2000-01, the Student was educationally placed in the residential program at ISD.

32. ISD is a state, tax-supported school open to all students in Iowa under twenty-one (21) years of age who have a hearing loss which is too great for them to progress satisfactorily in a regular or modified public school program. ISD is located on a one hundred twenty (120) acre

campus three and one-half miles south of Council Bluffs, Iowa. ISD's educational program utilizes total communication programming. The school is governed by the State Board of Regents. ISD also maintains a mainstream and off-campus program where its students attend classes in the public school system and non-disabled students from area public schools attend classes in ISD's vocational department through a "reverse mainstream" program. ISD is located approximately sixty (60) miles north of Rock Port, Missouri.

33. On December 6, 2000, an IEP was developed for the Student by an IEP team consisting of representatives from ISD, representatives from the Shenandoah District and the Student's Mother. The IEP team considered various placements from a placement in the general education environment in a local school district to a residential placement at ISD. (R Exh. 6, p. 21). The IEP team determined that the Student should be placed in a residential program and removed from a general education program one hundred percent (100%) of the time. (R Exh. 6). The IEP team gave the following reasons for this placement:

"[The Student] has a profound sensorineural hearing loss in her right ear and a severe loss in her left ear. She has limited communication skills. She has a difficult time expressing her wants and needs appropriately. These, plus her inability to attend and her behavior problems make it impossible for her to learn in a integrated setting even with an interpreter. . . [The Student] needs a Total Communication environment with the use of American Sign Language along with visual aids and tactile input. All the people in her environment need to use sign language to promote her language development. She requires a small student-to-teacher ratio to address her behavioral, social, communication and educational needs with the opportunity for one-on-one instruction. She needs a teacher's aide to help guide and monitor her behavior and give her one-on-one redirection as needed. She needs a teacher of the hearing impaired trained in adapting and modifying subject matter, behavior management, and communication needs to fit her learning style. She needs Speech/Language services that help her develop and improve her language and communication skills. She benefits from on-site audiological services. . . .Because of [the Student's] limited language and communication skills, she would not be able to communicate with her hearing peers. The use of an interpreter would not be appropriate because of her lack of attention and limited language abilities. [The Student] needs the opportunity for one-on-one instruction which would not be possible in a larger classroom. Her tendency to avoid instruction and become frustrated would not be helped by the larger class size and faster pace of a general education setting."

(R Exh. 6, p. 24).

34. The Student attended ISD in its residential program during school years 1999-2000 and 2000-2001.

35. During the Summer of 2001, the Parents moved into the District. In August, 2001, the District sought and received the Student's educational records from the Shenandoah District and ISD. (R Exh. 10, p. 41; Tr. pp. 136-137, C. Baldwin). The District has no other deaf students. (Tr. pp. 134; 153-154, C. Baldwin). After enrolling the Student, District personnel made

numerous contacts with area schools to determine the availability of programs that might be appropriate for the Student. (Tr. pp. 136-141, C. Baldwin).

36. On or around August 14, 2001, the Grandparents wrote a letter to Dr. Stephen Barr, Assistant Commissioner for the Division of Special Education for DESE, which requested that he allow the Student to continue to attend ISD. (R Exh. 41, pp. 130-131). On or about August 17, 2001, Ms. Heidi Atkins Lieberman, Legal Counsel for DESE's Division of Special Education, responded for Dr. Barr. Ms. Lieberman stated in her letter in pertinent part as follows:

“ . . . The Iowa School for the Deaf does not allow non-resident children to attend the school. . . . Since your granddaughter is now a Missouri resident, the responsibility for her services is that of the Rock Port School District in which she resides. As I understand it, the district has accepted your granddaughter's Individualized Education Program (IEP) which provides for a separate school placement. To implement that IEP, the district has referred your granddaughter to Missouri School for the Deaf and are awaiting word as to her acceptance. . . . Again, while the Rock Port School District is very open to the idea of sending your granddaughter to the Iowa School for the Deaf, they cannot do that because the Iowa School for the Deaf does not have authority to serve a child whose residence is not in Iowa. . . .”

(R Exh. 41).

37. At the hearing, the Parents presented documentary evidence which suggested that ISD accepts out-of-state students. (P Exh. pp. 30-48). Likewise, the District presented documentary evidence in the form of an affidavit of Ann Marie Brick, the Special Assistant Attorney General in the State of Iowa Department of Justice. (HP Exh. 21, Exhibit A). In her sworn affidavit, Ms. Brick testified that one of her duties was to advise the Iowa State Board of Regents ('Board of Regents'), the governing body of ISD, on legal matters affecting the interpretation of policy. Ms. Brick further testified that the Board of Regents' "long-standing policy" with respect to admission at ISD is that ISD

“ . . . will not admit non-resident students where there is a school for the deaf located in that student's state of residence. The only non-resident students admitted to [ISD] are students whose state of residence does not have a school for the deaf.”

(HP Exh. 21, Exhibit A, ¶ 3). The Hearing Panel accepts Ms. Brick's affidavit as setting forth the admission policy of ISD which has been in effect during all times material to this proceeding.

38. On September 7, 2001, an IEP meeting was held in the District. Present at this meeting were the Student's Mother, Richard Baldwin, Cindy Baldwin, Mary Underhill, Shantel Farnan, the Director of the Special Education Cooperative to which the District belongs and Jan Bone, the former Special Education Director at the Shenandoah District. The stated purpose of the meeting was to review the Student's IEP from ISD and discuss appropriate placements for her. (R Exh. 11, p. 49). The Student's Mother indicated on a Parent Participation Form which was

discussed at the meeting (R Exh. 12) that the Student should be placed in a first or second grade classroom. (R Exh. 12, p. 51, ¶ 10). Ms. Bone indicated she felt that the Student should be placed in a separate setting and at MSD, not in the District. (Tr. pp. 141-142; 146-148, C. Baldwin). The District rejected the Parents' proposed placement and issued a Notice of Action on September 7, 2001 which: (a) accepted the ISD evaluation report; (b) notified the Parents that the District would not be performing an additional evaluation or tests on the Student at this time; and, (c) stated that a "State School Placement [is] appropriate,," (R Exh. 13, p. 52), which was based on the Parents' statements. However, the Student's Mother disagreed with the District's proposed placement and its location at MSD in Fulton, Missouri. (Tr. p. 145, C. Baldwin).

39. On September 14, 2001, the District provided notice to the Parents that an IEP meeting would be convened on September 17, 2001 to discuss the "best educational program options for [the Student]". (R Exh. 14, p. 54).

40. During the IEP meeting on September 17, 2001, the District recommended that the Student be placed in the residential educational program at the Missouri School for the Deaf in Fulton, Missouri ("MSD"). (R Exh. 15, p. 55). The Parents disagreed with this proposed placement.

41. On September 18, 2001, the District provided the Parents with a Notice of Action (R Exh. 15) which stated that the District's proposed placement for the Student was at MSD. The District further indicated that the IEP team had considered the option of placing the Student in the general education program at the District but that option "was rejected based on [the Student's] need to be in a sign enriched environment as well as the need to have a comprehensive evaluation and observation completed." (R Exh. 15, p. 55). The Notice of Action also noted that the District would "continue to look for a certified interpreter to accompany [the Student] to the public school system as soon as it is found to be possible" and that while the District was "looking for the proper interpreter for [the Student] she need[ed] to be in school." (R Exh. 15, p. 55).

42. On or about October 8, 2001, the Student was admitted to MSD for evaluation. She was accepted by MSD and remained at MSD in its residential educational program until November 16, 2001, the beginning of the Thanksgiving Holiday break. The Student did not return to MSD following the Thanksgiving Holiday break. (Tr. pp. 19-20, Bastean).

43. MSD is located in Fulton, Missouri and is under the direct control of DESE. The elementary grades are housed in Stark School. The elementary building focuses on pre-school through fifth grade. Upon completion of fifth grade the students graduate and move to Rice School, the middle school program. Deaf and hard of hearing students who reside in Missouri are enrolled in the school. Dormitories provide housing for those students in the residential program of the school. MSD's educational program provides an environment rich in ASL. All staff members sign so the students have access to all communications without an interpreter. The use of ASL for all communication and learning experiences which are incidental such as on the playground and in the dining room, as well as in the classroom promotes language development. Student who are enrolled in the elementary program have their academic and adaptive skills assessed. MSD provides a full-time audiologist, two psychologists and a full-time social worker. MSD is located approximately two hundred seventy (270) miles from the District.(Tr. pp. 11-

16, Basteau). MSD currently allows its residential students the opportunity to return to their homes each weekend. Tom Basteau, Assistant Superintendent for MSD, testified that if the Student was enrolled in their program, she would be allowed to return to her home each weekend and MSD would transport her to St. Joseph, Missouri at no cost to her or her Parents.² (Tr. pp. 66-68, Basteau). The school year at MSD is one hundred eighty days. (Tr. p. 69, Basteau).

44. When the Student was admitted to MSD, she seemed to adjust to her new educational environment. (Tr. p. 25, Basteau). However, she exhibited minimal skills in ASL. (Tr. pp. 26-27, Basteau). Mr. Basteau testified that the Student needs a teacher of the deaf and signing peers³ in her educational environment so she would be immersed in sign language in to progress. (Tr. pp. 32-37; 43-44; 58-60, Basteau). He also testified that it was his opinion that the Student would be lost in a regular education program with an interpreter. (Tr. p. 33, Basteau).⁴

45. The Student's teacher at MSD, Ms. Debbie Burnaman testified that she has a masters degree in deaf education and deaf studies. (Tr. pp. 85-86, Burnaman). When the Student was in her classroom she had five students. (Tr. p. 88, Burnaman). Ms. Burnaman assessed the Student as being: "very much behind" in her writing skills; unable to read first grade materials; and at grade level in math. (Tr. pp. 89-90, Burnaman). Ms. Burnaman also testified that it was her opinion that the Student should not be placed in a regular public school classroom which has no deaf signing peers in it, but should be placed at MSD. (Tr. p. 96, lines 14-24, Burnaman).

46. On November 7, 2001, MSD provided the Parents with notice of an IEP meeting to be held by telephone conference on November 19, 2001 to review and discuss possible revisions to the Student's IEP. (R Exh. 16).

47. On November 19, 2001, the IEP meeting was held. The following individuals were in attendance at the meeting: The Parents; the Student's Mother's parents; Mary Underhill, Special Education Teacher; Cindy Baldwin, Principal and Local Education Agency ("LEA") representative; Tom Basteau, MSD Elementary Education Supervisor; Debbie Burnaman, MSD Special Education Teacher; Sharon Brown, MSD School Social Worker; and an interpreter for Mr. Basteau. (R Exh. 20, pp. 68-69). The proposed IEP was developed by the staff at MSD and accurately sets forth the Student's present level of performance. (Tr. p 38, Basteau). During this meeting, Sara Krutz, an interpreter, explained the role of an interpreter in education to the

² St. Joseph, Missouri is located approximately sixty (60) miles south of Rock Port, Missouri on Interstate 29.

³ Mr. Basteau testified that deaf children like the Student "need access to peers at their own age levels so they can carry on conversations, meet their conversational needs." (Tr. p. 52, lines 5-11, Basteau).

⁴ Mr. Basteau testified that a sign interpreter merely "relays information between the student and the teacher. . . The interpreter is not a teacher, and so the interpreter will just interpret what the teacher says to the student and they won't add any explanation to that message. . . They don't teach anything." (Tr. p. 50, lines 10-25, Basteau).

Parents. During the meeting, the District recommended that the Student be placed in a separate school setting. (R Exh. 21, p. 80).

48. In formulating its placement proposal on and around November 19, 2001, the District determined that the education of the Student in a regular education classroom, with the use of supplementary aids and services, could not be achieved satisfactorily in the District. The District also determined that its placement proposal, Separate School Setting, would integrate the Student to the maximum extent appropriate. In making its placement proposal, the District considered the following:

A. The curriculum and goals of the regular education class — The District determined that it was unable to provide the Student with the following in a regular education setting: (1) an environment where one-on-one or small-group instruction can be utilized to address the Student's disability; (2) a modified curriculum which incorporated reteaching and supplementary materials; and, (3) a modified curriculum adjusted to the Student's level of learning. (R Exh. 21, p. 80). Likewise, the District determined that it was unable to provide a sign-enriched environment for the Student.

B. The sufficiency of the district's efforts to accommodate the child with a disability in the regular class — Prior to the November 19, 2001, meeting the District had accepted the ISD-prepared evaluation and IEP, to which the Parents had previously agreed, and the Student had been reevaluated by MSD. While the Student was never placed in the general education classrooms in the District, the Student's present level of performance, the Student's evaluations and the Student's previous IEPs indicated that the Student could not be appropriately accommodated in the general education classrooms of the District. The District also considered the fact that the Student's need for there to be a "critical mass of deaf signing peers" in the classroom could simply not be met in the classrooms of the District. Since the Student was unable to effectively communicate in oral, written or sign language due to her deafness and lack of educational background, it was necessary to conduct the deaf education program for her with other deaf children. (R Exh. 21, p. 81).

C. The degree to which the child with a disability will receive educational benefit from [the] regular classroom — The District determined that the Student would not receive education benefit if she were placed in a regular education classroom in the District, even if she had an interpreter. The Student's profound deafness, inability to meaningfully communicate with the teacher and other students in the regular education classroom, extremely limited language base, limited ability to communicate in writing and minimal word recognition and reading skills prohibited the satisfactory education of the Student in a regular education classroom, even with the use of supplementary aids and services like an interpreter. The placement of the Student in the general education classroom, even with an interpreter, as requested by the Parents would be an inappropriate placement for the Student. Placement of the Student in a general education classroom is not the least restrictive environment for the Student due to her present level of performance described above. The District determined that the Student required a sign enriched placement because she was still learning sign language. (R Exh. 21, p. 81).

D. The effect the presence of a child with a disability may have on the regular classroom environment and on the education that the other students are receiving — The District determined that the presence of the Student would have no adverse effect on the overall classroom environment.

E. The nature and severity of the child's disability — The District determined that the Student was profoundly deaf and had limited formal education during the past two school years. In many educational areas, the Student's present level of functioning was at a kindergarten or pre-kindergarten level. The District determined that the Student's profound lack of a language base prohibited the effective use of an interpreter because the Student did not understand the language which was being interpreted; the Student's self esteem could be damaged if she was placed in a regular education classroom due to her inability to communicate with the other students in the classroom; and, she would benefit very little from the education provided in the regular education classroom. (R Exh. 21, p. 82).

49. During the November 19, 2001, IEP meeting the Parents stated that they desired to have the Student placed in a regular education classroom in the District with a sign interpreter to assist her. The Parents further stated that if the District did not agree with their proposed placement they would withdraw the Student and home school her. (R Exh. 26, p. 87; Tr. p. 153, C. Baldwin).

50. On November 21, 2001, the District provided the Parents with a Notice of Action - Refused. (R Exh. 22). This Notice of Action states in pertinent part as follows:

Description and Explanation of Action: . . . The parents of [the Student] have requested that [the Student] be placed in the Rock Port Public Schools with a sign language interpreter. This request was refused by the Rock Port R-II Schools based on information from the Missouri School for the Deaf and [the Student's] current IEP, that indicates that her present level of performance is not adequate for this placement. The IEP team feels that [the Student] does not possess the sign language skills to enable her to be successful with that type of placement. At this time, continued placement in the Missouri School for the Deaf is the recommendation of Rock Port R-II Schools and the Missouri School for the Deaf.

Options Considered and Why Rejected: . . . Placement in the public school system without the aid of sign language as a primary means of communication. This was rejected based on [the Student's] profound hearing loss and her inability to communicate without the use of sign language. The team did consider placement in the regular classroom with an interpreter – this was rejected based on her current IEP and her present level of performance. [The Student] needs instruction in sign language and all academic areas before she can effectively use an interpreter. The team felt the public school with an interpreter would be a more restrictive placement for [the Student] at this time.”

(R Exh. 22, p. 83).

51. On November 27, 2001, the Student did not return to MSD following the Thanksgiving Holiday break and was officially removed from MSD by her Parents. (R Exh. 24; Tr. p. 19 Bastean).

52. On January 15, 2002, Mr. Baldwin wrote the Parents and stated that: (a) as a student who was receiving home schooling, the Student was eligible to receive “special services valued as a proportionate share of services provided all students within the Rock Port School District; and, (b) the District was “ready and willing to continue to serve [the Student] through a regular IEP placement,” but respected the Parents’ decision to home school the Student. Mr. Baldwin further offered to meet with the Parents on January 23, 2002 to develop a service plan for the Student. (R Exh. 26, p. 87).

53. On January 23, 2002, the District representatives met with the Student’s Mother to develop a proportionate share service plan for the Student.

54. On March 25, 2002, the District provided the Parents with notice of an IEP meeting to be held on April 3, 2002 to review the Student’s current evaluation information, review her IEP and “revisit [the] reevaluation need.” (R Exh. 28, p. 89).

55. The April 3, 2002, IEP meeting was attended by the Parents, the Student, the Student’s Mother’s parents, Mary Underhill, Cindy Baldwin, Richard Baldwin, Elizabeth Mooney (District’s Attorney) and Shawn Hayes (Missouri Protection and Advocacy Service). (R Exh. 31, p 97). During the meeting the District proposed that a comprehensive reevaluation of the Student be conducted by MSD, (R Exh. 29, p 94), because the District felt it did not have the expertise to evaluate the Student. The District provided the Parents with a Notice of Reevaluation dated April 3, 2002. (R Exh. 29). During the meeting the Parents requested that the District provide Homebound Instruction for the Student (R Exh. 32, p 107) and then informed the IEP team that they intended to continue to home school the Student. (R Exh. 31, p 106).

56. On April 4, 2002, the District provided the Parents with a Notice of Action - Refused (R Exh. 32) in which the District refused to provide Homebound services for the Student. The Notice of Action states in pertinent part:

“Description and Explanation of Action: . . . The parents of [the Student] have requested that the Rock Port R-II Schools provide Homebound instruction until her reevaluation is completed. This request was refused by the district based on information from the Missouri School for the Deaf and [the Student’s] most recent IEP that indicates her PLP (present level of performance) is not adequate for this type of service. The IEP team does not feel that [the Student] possesses the language skills to be successful with this type of service.

Options Considered and Why Rejected: . . . – Placement in the public school system without the aide (sic) of sign language as a privary means of communication was considered on an interim basis. This was rejected based on [the Student’s] profound hearing loss and her inability to communicate without the use of sign language. – Considerations was (sic) also given to placement in

the public school system with the use of an interpreter. This was rejected based on her current IEP and her present level of performance. [The Student] needs instruction in sign language and all academic areas before she can effectively use an interpreter. The team felt the public school with an interpreter would be a more restrictive placement for [the Student] at this time.”

(R Exh. 32, p. 107).

57. On April 14, 2002, the District and the Parents completed a Request for Evaluation Services form from MSD. (R Exh. 33).

58. On or around April 16, 2002, the District employed Tina Murdoch to conduct five (5) one hour teaching sessions with the Student between April, 2002 and June, 2002 at the Student’s home in Rock Port, Missouri. (R Exh. 34, p 112). Ms. Murdoch is a certified teacher of the deaf and hard of hearing who has more than twenty-one years of experience teaching deaf and hard of hearing children and has taught at ISD. (Tr. pp. 182-183, Murdoch).

59. On or around April 18, 2002, the District and the Parents prepared a Service Plan for the Student which would be used in conjunction with the lessons taught by Tina Murdoch. (R Exh. 36). Ms Murdoch subsequently provided these services. (Tr. p. 184, Murdoch).

60. On April 24, 2002, the District finalized arrangements with MSD to perform a reevaluation of the Student on May 14, 2002. (R Exh. 37). Those arrangements were sent to the Parents by Mr. Baldwin by letter dated April 29, 2002. (R Exh. 39).

61. On May 14, 2002, the Student was reevaluated at MSD. (R Exhs. 42-43). On May 17, 2002, MSD prepared a Psychoeducational Evaluation for the Student. (R Exh. 43). The evaluation contains the following conclusions:

“[The Student] is an 8-year, 8-month old student with a profound hearing loss, who is functioning in the average range of nonverbal cognitive ability. Visual-motor perception skills were delayed appearing to be a result of lack of experience to develop these skills appropriately. Academic skills are at the readiness (pre-kindergarten/early kindergarten) level. Language skills were minimal for what would be expected of a deaf student her age.

[The Student’s] cognitive assessment results are not due to the effects of environmental, cultural, or economic disadvantages.

The academic assessment results appear to be impacted by the lack of sufficient exposure to a visual, accessible language and language experiences. Delays in these skills would impact academic achievement, as this requires a solid language foundation upon which to build for progress to occur. Language and reading abilities are assumed to have been established during the preschool and primary grades, as grades beyond this level will emphasize using language and reading skills for learning academic content. The lack of established language and

reading abilities will result in greater discrepancies in achievement as [the Student] gets older.

Regarding sign language interpreters, they are designed to interpret from one language to another, assuming the individual they are interpreting for has a solid foundation in a language. Interpreters in the classroom are not expected to assist as a teacher's aide for the deaf student and are not expected to have teaching experience. The role is to relay the teacher's language to a language accessible to the student. Individuals who do not have a solid language foundation in a language would have great difficulty working with an interpreter. For those who do not have the language foundation, learning information/content would be reduced, due to the mental energy being spent on trying to process a language in which there is no foundation. Direct instruction in a visually accessible language would be the most accessible channel for communication and learning and would preserve the mental energy needed to focus on concepts/content for academics.

For deaf students, the consideration of communication for the least restrict environment is required by Part B of the Individuals with Disabilities Education Act – 1997 (IDEA-1997) as administered by the Missouri State Plan for Special Education. This will need to be considered using the assessment data, when considering [the Student's] language and communication needs for academic progress and placement.”

(R Exh. 43, pp. 135-136). The evaluation team at MSD found that the Student made minimal educational progress since they first evaluated her in October-November, 2001. (Tr. p. 41, Bastean). The information contained in the MSD Psychoeducational Evaluation for the Student (R Exh. 43) was orally shared with the Parents on May 14, 2002 at MSD. (R Exh. 45, p. 148).

62. On May 31, 2002, the District provided notice to the Parents of a meeting of the Student's IEP team on June 11, 2002 to review the current evaluation information and review/revise the IEP. (R Exh. 44). Subsequently, the June 11 meeting was rescheduled at the request of the Parents. (R Exh. 46). On June 13, 2002, the District again provided notice to the Parents of a meeting of the Student's IEP team on June 19, 2002 to review the current evaluation information and review/revise the IEP. (R Exh. 46). This meeting was also postponed at the request of the Student's Mother (R Exh. 46, p. 149), and was rescheduled by agreement to July 15, 2002. (R Exhs. 46-47, pp. 149-150).

63. On July 15, 2002, the Parents did not appear for the third rescheduled meeting of the Student's IEP team. The Student's IEP team proceeded with the discussion of the Student's reevaluation, preparation of the Student's IEP and a placement decision. Present at the meeting were Richard Baldwin, Cindy Baldwin, Mary Underhill and Jennifer Hampton, a Missouri Certified School Psychologist from MSD who prepared the Psychoeducation Evaluation of the Student. (R Exh. 45, p. 148). The Student's IEP team recommended that the Student be placed in a separate school placement, with the location of the placement being at MSD. In making the placement decision, the IEP team reviewed and rejected placements in the Regular Class-Class within a Class and Modified Regular Education. (R Exh. 50, p. 162). The Student's IEP team, without the Parents, determined that a Separate School placement was appropriate because:

“[The Student’s] need for instruction in a sign enriched environment. This information is taken from the current evaluation from the [MSD] indicating that [the Student] is below grade level in all academic areas due to her lack of exposure to a visual accessible language and language experiences. At this time the use of an interpreter is found to be inappropriate for [the Student] as she has no foundation in a visually accessible language that would enable her to benefit from an interpreter.”

(R Exh. 50, p. 162).

64. The Student’s July 15, 2002, IEP states the following with respect to her present level of educational performance:

“Describe strengths relative to general curriculum – . . . [the Student] has an age appropriate attention span and appears to want to learn. She enjoys reading time. She is able to write upper case alphabet letters (when they are finger spelled) and most lower case letters. She is able to perform single digit addition problems with accuracy.

Describe how the disability affects involvement and progress in general curriculum – [The student] has a profound sensor neural hearing loss in both ears. This disability makes it difficult for her to communicate with non-signing peers and teachers. Her least restrictive environment needs to be sign enriched. She is learning American Sign Language. She is able to express herself using gestures and body language to show her likes and dislikes. She is unable to use sign to express all of her needs and feelings accurately at this time. At this time the MSD instructors feel that [the Student’s] lack of communication skills make her unable to be successful in a public school environment due to her inability to communicate with her teachers and peers. Her signing skills are not up to a level recommended for the successful use of an interpreter.

Describe changes/growth since the last IEP – Since the last IEP meeting [the Student] has been . . . home schooled. Based on information from the most current evaluation and from her service plan provider, [the Student] has learned the majority of her upper case alphabet letters. She is now unable to write only 6 lower case letters with the occasional confusions of b, p, and d. She is able to perform simple one digit addition problems.

Describe how the present level of performance relates to the most recent evaluation – [MSD] just recently evaluated [the Student] (May 14, 2002). This PLEP is being written based on their evaluation report to the school and family.

Describe areas of concern – The IEP team is concerned about [the Student’s] inability to communicate with nonsigning teachers and peers as well as their inability to communicate with her. Her need for a sign enriched environment, a lack of sufficient exposure to a visual, accessible language and language experiences, which appear to have had an impact on her academic progress.

Summarize the team’s ideas for enhancing the education of [the Student] – . . . It is the team’s goal to educate [the Student] in the least restrictive environment for

her. To provide [the Student] with the communication and academic skills needed to be a productive socially well adjusted adult. . . .”

(R Exh. 50, p. 155).

65. In formulating its placement proposal on and around July 15, 2002, the District determined that the education of the Student in a regular education classroom, with the use of supplementary aids and services, could not be achieved satisfactorily in the District.

66. In formulating its placement proposal on and around July 15, 2002, the District determined that its placement proposal, Separate School Setting, would integrate the Student to the maximum extent appropriate. In making its placement proposal, the District considered the following:

A. The curriculum and goals of the regular education class — The District’s previous determination that it was unable to provide the Student with certain services in a regular education setting remained the same. The District considered the strengths of the Student; the concerns of the Parents which had been communicated to the District prior to the meeting; the results of the Student’s most recent evaluation; the communication needs of the Student; and, whether the student required assistive technology. (R Exh. 50, pp. 155-162).

B. The sufficiency of the district’s efforts to accommodate the child with a disability in the regular class — Prior to the November 19, 2001, meeting the District had accepted the ISD-prepared evaluation and IEP, to which the Parents had previously agreed and the Student had been reevaluated by MSD. While the Student was never placed in the general education classrooms in the District, the Student’s present level of performance, the evaluations and the Student’s previous IEPs stated that the Student could not be appropriately accommodated in the general education classrooms of the District. The Student’s need for there to be a “critical mass of deaf signing peers” in the classroom could simply not be met in the classrooms of the District. Since the Student was unable to communicate due to her deafness, it was necessary to conduct the deaf education program for her with other deaf children. (R Exh. 21, p. 81).

C. The degree to which the child with a disability will receive educational benefit from [the] regular classroom — In addition to the considerations made during the November 19, 2001, IEP meeting, the District considered certain potentially harmful effects on the Student including skills required by the Student’s IEP which could not be provided in a less-restrictive environment; the degree to which the Student’s present level of functioning prevented her from meeting the IEP objectives in a large group setting; and, the extent to which the Student required specially designed materials, supplies, presentation methods and equipment which prohibited access to the curriculum and goals of the regular education class. (R Exh. 50, p. 163). The IEP team also considered the “special considerations” including the extent to which the Student’s behavior impedes the ability of the Student to learn; the extent the Student is limited English proficient; the language and communication needs of the Student; opportunities for direct communication in the Student’s communication mode/language with peers and adults;

the Student's academic level; and, the ability to provide direct instruction to the Student in her language and communication mode. (R Exh. 50, pp. 155-162).

D. The effect the presence of a child with a disability may have on the regular classroom environment and on the education that the other students are receiving — The District determined that it felt that no harmful effects would be present by the Student's presence in a regular education class which would cause a significant disruption or have a negative effect on the education of other students in the class. (R Exh. 50, pp. 155-163).

E. The nature and severity of the child's disability — The nature and extent of the Student's disability had not changed since it was considered in November, 2001. The Student is profoundly deaf and has limited formal education in the past two school years. The Student is functioning at a kindergarten or pre-kindergarten level. The Student's profound lack of a language base prohibited the effective use of an interpreter because the Student does not understand the language which is being interpreted. The Student's self esteem could be damaged if she was placed in a regular education classroom due to her inability to communicate with the other students in the classroom and she would benefit very little from the education provided in the regular education classroom. (R Exh. 21, p. 82).

67. On July 15, 2002, Ms. Underhill wrote the Parents to inform them of the meeting and the decisions that had been made in their absence. (R Exh. 49). Ms. Underhill's letter enclosed a copy of the District Diagnostic Summary (R Exh. 45); a copy of the Student's IEP dated July 15, 2002 (R Exh. 50); a copy of the Notice of Action – Proposed, dated July 15, 2002 (R Exh. 48); and, a copy of the Procedural Safeguards. The Notice of Action – Proposed states in pertinent part as follows:

“Description and Explanation of Action: . . . Based on the IEP team's review of the present evaluation of [the Student's] academic progress, we recommend [the Student] be placed in the Missouri School for the Deaf. This placement is (sic) would allow sufficient exposure to a visual accessible language and language experiences. This exposure is necessary for her to progress in her academic skills.

Options Considered and Why Rejected: . . . – Placement in the public school system without the aid of sign language as a primary means of communication. This was rejected based on [the Student's] profound hearing loss and her inability to communicate without the use of sign language. – The team did consider placement in the regular classroom with an interpreter – this was rejected based on her current IEP and her present level of performance which indicate that her sign language skills are too low for this to be effective. The team felt the public school with an interpreter would be a more restrictive placement for [the Student] at this time.”

(R Exh. 48, p 151).

68. On July 23, 2002, the District provided notice to the Parents that an IEP meeting would be conducted on August 1, 2002, to review the current evaluation information and review/revise the Student's IEP. (R Exh. 51). On July 24, 2002, the Student's Mother's Mother called and informed the District that August 1 was not a good day for the IEP meeting in that Shawn Hayes was not available. (R Exh. 51, p. 164).

69. On August 2, 2002, the District provided notice to the Parents that the IEP meeting which was originally scheduled for August 1, 2002, would be rescheduled for August 12, 2002, to review the current evaluation information and review/revise the Student's IEP. (R Exh. 52).

70. On August 12, 2002, an IEP meeting was held. During the meeting the Parents requested: (a) that the District provide Homebound Instruction for the Student until her reevaluation was completed; and, (b) that the Student be allowed to attend regular education classes in the District on a partial day setting while being home schooled. (R Exhs. 53-54). The District refused both of these requests.

71. On August 13, 2002, the District provided the Parents with a Notice of Action– Refused regarding the Parents request that the District provide the Student with Homebound Instruction until her reevaluation was completed. The Notice of Action – Refused states in pertinent part as follows:

“Description and Explanation of Action: . . . The parents of [the Student] have requested that the Rock Port R-II Schools provide Homebound instruction until her reevaluation is completed. (R Exh. 53). This request was refused by the district based on information from the Missouri School for the Deaf and [the Student's] most recent IEP that indicates her PLP (present level of performance) is not adequate for this type of service. The IEP team does not feel that [the Student] possesses the language skills to be successful with this type of service. The IEP team determined that MSD would be a more appropriate placement for [the Student] as she needs to be in a sign enriched environment.

Options Considered and Why Rejected: . . . – Placement in the public school system without the aide (sic) of sign language as a primary means of communication was considered on an interim basis. This was rejected based on [the Student's] profound hearing loss and her inability to communicate without the use of sign language in an academic setting.”

(R Exh. 53, p. 166).

72. On August 13, 2002, the District provided the Parents with a Notice of Action– Refused regarding the Parents request that the Student be allowed to attend regular education classes in the District on a partial day setting while being home schooled. (R Exh. 54). The Notice of Action – Refused states in pertinent part as follows:

“Description and Explanation of Action: . . . The parents of [the Student] have requested that [the Student] be allowed to attend the Rock Port R-II Elementary in a partial day setting while being home schooled. This is being refused by the

district based on the IEP team's determination on 8-2-02 that [the Student] would best be served in the sign enriched environment of MSD. Therefore, this is considered an inappropriate placement at this time.

Options Considered and Why Rejected: . . . Homebound placement was considered and rejected based on [the Student's] need to receive more than 5 hours of academic instruction per week as well as her need for being in a sign enriched environment. This type of an environment would not be available through homebound placement."

(R Exh. 54, p. 167).

73. The Parents elected to home school the Student during school year 2002-03.

74. Around August, 2002, the Parents, through Shawn Hayes, indicated they wished to obtain an independent evaluation. Cindy Baldwin subsequently provided Mr. Hayes with the names of two (2) qualified evaluators, Boys' Town in Omaha, Nebraska and an evaluator in Kansas City, Missouri. The District heard nothing more from the Parents or Mr. Hayes about the independent evaluation. (Tr. pp. 172-175, C. Baldwin).

75. On October 31, 2002, Mary Underhill wrote a letter to the Parents (R Exh. 56) which invited them to attend a meeting on November 15, 2002, to determine the proportionate share services for students being home schooled and students who are enrolled in private school in the district. The letter further offered to continue the services of Tina Murdoch, in the same manner as those services were provided to the Student during school year 2001-02. A copy of the Notice of Meeting (R Exh. 57) was attached to the letter with a copy of the Procedural Safeguards. On November 11, 2002, the District received a verbal confirmation from the Student's Mother that she would attend the meeting. (R Exh. 57, p. 171).

76. On November 15, 2002, a meeting was held with the Parents to review the Student's Service Plan. During the meeting the District proposed to continue to use the services of Tina Murdoch in the same manner as those services were provided to the Student during school year 2001-02. The Parents rejected this proposal.

77. On November 15, 2002, the District provided the Parents with a Notice of Action – Proposed. (R Exh. 58). The Notice of Action – Proposed states in pertinent part as follows:

Description and Explanation of Action: . . . We propose to provide Proportionate Share Services to [the Student] by paying an itinerant deaf educator to come to the home to provide educational services. This service will be provided for the amount of minutes and number of sessions described in [the Student's] Service Plan of which you have been given a copy.

Options Considered and Why Rejected: . . . At this time no other options were considered as [the Student] is being home schooled."

(R Exh. 58, p. 172).

78. On January 8, 2003, the District contracted with Tina Murdoch to provide ten (10) one hour teaching sessions to the Student in her home from January, 2003, through May, 2003. (R Exh. 59, p. 174). Ms. Murdoch subsequently provided these services. (Tr. p. 184, Murdoch).

79. Ms. Murdoch testified that it was her opinion that the Student needs to be placed in a “classroom staffed by a teacher of the deaf/hard of hearing with a critical mass of signing peers.” (Tr. p. 186, lines 3-6, Murdoch). Ms. Murdoch defined the term “critical mass of signing peers” as “peers or classmates that would also be able to sign so that she would be able to get the incidental learning that is going on around her.” (Tr. p. 186, lines 14-17, Murdoch). Ms. Murdoch assessed the Student’s educational abilities as follows:

“[The Student] is . . . age wise. . . approximately a fourth grader. [The Student] . . . when I finished with her at the end of this school year she was reading approximately 22 out of 53 words, which is approximately a pre or kindergarten level. She can read two- to three-word sentences with known words but not always consistently. She does have some problems remembering. She has a lot of difficulty writing simple sentences in two to three words.”

(Tr. p. 186, lines 22-25; p. 187, lines 1-7, Murdoch).

80. On January 14, 2003, the District contacted the Student’s Mother by telephone to schedule an IEP meeting for January 23, 2003 to review or revise the Student’s IEP. (R Exh. 60). This meeting was requested by the Parents. On January 15, 2003, the District provided the Parents with written notice of the meeting. (R Exh. 61).

81. On January 23, 2003, an IEP meeting was conducted which was attended by Richard Baldwin, Mary Underhill, Cindy Baldwin, the Parents, the Student’s Mother’s Parents and John Brink, attorney for the District. Also attending the meeting by telephone was Shawn Hayes. (R Exh. 62, p. 177). Mr. Hayes informed the IEP team that he had contacted ISD to determine whether ISD would be willing to accept the Student into their residential educational program. The District’s representatives stated that it was their position that the Student would benefit from a residential placement in a school for the deaf where she could be placed in a sign enriched educational environment. The Parents stated that they would agree to such a placement if it was at ISD. The District agreed to consider this option and respond to the Parents within ten days. (R Exh. 63).

82. On January 30, 2003, Mr. Baldwin wrote to the Parents denying their request for the Student to attend ISD. (R Exh. 64). The letter states in pertinent part as follows:

“ This letter responds to your request that the District agree to send [the Student] to [ISD] to receive the services provided for in her IEP.

As you know, [the Student’s] IEP team met on Thursday, January 23, 2003, to discuss your request. Your advocate, Shawn Hayes, participated in the meeting by telephone. During the meeting, the members of [the Student’s] IEP team confirmed that she requires a separate school placement. No one stated any disagreement with the team’s previous conclusion that [MSD] can appropriately meet [the Student’s] educational needs. No new information regarding [the

Student] was brought to the team's attention that might have affected this conclusion. As the team members agreed, the only question to be decided at this point is whether [the Student's] IEP services will be provided at ISD or MSD.

As was discussed during the meeting, about you (through Mr. Hayes) and the District have sought guidance from [DESE] regarding the appropriate manner for resolving that question. Mr. Hayes agreed that DESE guidance indicated that the decision is one to be made administratively rather than by the IEP team process. I advised you that I would make the administrative decision on behalf of the District.

Reaching a decision on your request requires me to balance various factors. With respect to [the Student's] ability to benefit from her education program, the information available to the District clearly demonstrates that MSD can appropriately meet [the Student's] needs. Based on reports to the District, [the Student] made progress while at MSD and enjoyed being a student there. I believe the benefit to [the Student] from being in the language rich environment available at MSD is clear.

From my discussions with you, I understand that you believe the chief benefit to [the Student] of attending ISD is that her attendance there would allow her to spend more time with her family. However, attendance at ISD would also require a substantial amount of travel time and likely would result in [the Student] spending less time in the language rich environment that she needs. Thus, it is not clear to me that attendance at ISD would result in that same educational benefit to [the Student] that she would receive if she attended MSD.

Given the nature of the question for me to decide, I believe it also is appropriate for me to consider your request in light of the impact that allowing [the Student] to attend ISD would have on the District as a whole, including the District's financial resources. In that regard, the benefit to the District if [the Student] were to attend MSD is substantial.

After balancing these factors, I have decided to deny your request. The decision has not been an easy one for me to reach because I understand the importance that it has for you and your family. However, I believe my decision appropriately addresses the important factors that are involved."

(R Exh. 64, pp. 179-180).

83. On March 6, 2003, the Student's Mother telephoned Mr. Baldwin and indicated that she had not received a Notice of Action - Refused from the January 23, 2003, IEP meeting. On March 7, 2003, Mr. Baldwin responded to the Student's Mother by letter (R Exh. 65) which enclosed a copy of his January 30, 2003 letter. (R Exh. 64).

84. On June 10, 2003, the Parents filed this Request for due process. (HP Exh. 1).

85. At the time of the hearing, the Student was slightly over ten (10) years of age. Between approximately May, 2001, and the date of the hearing, the Student had only received formal education services in a public school for approximately five weeks, from October 8, 2001 until November 16, 2001 when she was at MSD. Prior to that time, the Student spent two school years at ISD and an unspecified amount of time in a public school in Louisiana. When the Student was not enrolled in a public school program, she has been home schooled by her Parents.

86. In order for a general education classroom to be appropriate for the Student at this time, the classroom would need to contain a “critical mass of deaf signing peers” to provide the Student with the needed language development. This educational setting is necessary because the Student is currently reading at a pre-kindergarten level, can not write sentences, has an extremely limited vocabulary and language development which is at the kindergarten level.

II. CONCLUSIONS OF LAW

87. The Student is a “child with a disability,” as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and the State Plan in that the Student’s disability meets the categorical definition of “Deafness” set forth in the *Missouri State Plan for Special Education, Regulations Implementing Part B of the Individuals With Disabilities Education Act (2001)* (“State Plan”) p. 16, which states:

“‘Deafness’ means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child’s educational performance.”

88. The District is a Missouri public school district organized pursuant to Section 162.211 *et seq.* RSMo.

89. The Student and her Parents are now and have been residents of and domiciled in the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

90. The IDEA, its regulations and the State Plan set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

91. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as District, in providing special education and related services to students with disabilities.

92. The purpose of the IDEA and its regulations is: (1) “to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs”; (2) “to ensure that the rights of children with disabilities and their parents are protected”; and, (3) “to assess and ensure the effectiveness of efforts to educate those children.” 34 C.F.R. § 300.1.

93. The IDEA requires that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term “free appropriate public education” is defined by 34 C.F.R. § 300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State involved; and,
- (d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340--300.350.”

A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

94. The IDEA is designed to enable children with disabilities to have access to FAPE which is designed to meet their particular needs. *O’Toole by O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires District to provide a child with a disability with a “basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child.” *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” *Rowley, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 612; and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, “achieve outstanding results”, *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that is “absolutely [the] best”, *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998); that will provide “superior results,” *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7th Cir. 1991).

95. The Supreme Court in *Rowley, supra.*, 458 U.S. 176, 206-207; 102 S.Ct, 3050-51 (1982) established a two part test for determining whether a child is receiving FAPE. That test is: (a) whether the IDEA procedures have been followed and (b) whether the IEP developed for the child was “reasonably calculated to enable the child to receive educational benefits.” *Id.*

96. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort*

Zumwalt School District v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

97. The Parents and Student were afforded their due process rights as required by the IDEA, 20 U.S.C. § 1415(h), the IDEA Regulations, 34 C.F.R. § 300.509(a) and the State Plan, including, but not limited to the following rights at the due process hearing:

- A. The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- B. The right to present evidence and confront, cross-examine, and compel the attendance of witnesses;
- C. The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
- D. The right to obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
- E. The right to obtain written, or, at the option of the parents, electronic findings of fact and decisions.

98. The Student has been, and is being provided FAPE by the District in that the District: (a) has followed the procedures of the IDEA and State Plan; and, (b) the IEPs which have been developed by and/or accepted by the District have been reasonably calculated to enable the Student to receive educational benefits as is more fully set forth below.

99. The State Plan sets forth the State's implementing regulations regarding the procedures for handling a child with a disability who transfers from a school located outside the State of Missouri. (State Plan, pp. 40-41). The State Plan states in pertinent part as follows:

"Out of State Transfers

For students who transfer from another state to a Missouri public agency and are suspected of having a disability, at the time of enrollment the public agency shall, without delay, request special education records from the out-of-state agency. If, within 30 days of the request for records, an evaluation report is not received from the out-of-state agency, the public agency shall proceed with an Initial Evaluation as outlined in Regulation III.3.

When a student from another State enrolls in a Missouri school district with a copy of a current evaluation report and/or IEP or upon receipt of such records from the out-of-state agency, the following procedures will apply:

- A. The receiving school district in Missouri shall review the information contained in the evaluation report to determine if the student meets eligibility criteria outlined in this State Plan; and,

- B. Provide prior written notice to the parent(s) of the child indicating the acceptance or rejection of the evaluation report from the out-of-state agency.

If the district accepts the evaluation report from the previous state and a current IEP was received:

- A. The public agency must review and accept or reject the IEP from the previous state. In accepting the IEP, the public agency must document the parent's satisfaction with the IEP; or,
- B. If the public agency rejects the IEP, an IEP meeting must be held as soon as possible, but not more than thirty (30) calendar days after the Notice to accept the evaluation report was provided."

100. The District's handling of the Student's transfer from ISD to the District at the beginning of school year 2001-02 met the requirements of the IDEA and the State Plan in that:

- A. The District obtained the Student's educational records, including the Student's most recent evaluation and IEP, in a timely manner from ISD and the Shenandoah District;
- B. The District reviewed the information contained in the Student's evaluation report, in a timely manner, to determine if the student meets eligibility criteria outlined in this State Plan; and,
- C. The District provided prior written notice to the Parents indicating the acceptance of the evaluation report from ISD and the Shenandoah District.

101. The following actions of the District and/or MSD met the requirements of the IDEA and the State Plan:

- A. The District's acceptance of the Student's ISD-prepared April 14, 1999, Evaluation (R Exhs. 3, 4 and 5) and the Student's ISD-prepared December 6, 2000, IEP (R Exh. 6), on August 9, 2001;
- B. The Student's ISD-prepared April 14, 1999, Evaluation (R Exhs. 3, 4 and 5), which was accepted by the District;
- C. The Student's ISD-prepared December 6, 2000, IEP (R Exh. 6), which was accepted by the District;
- D. The decision to place the Student in a Separate School Setting at MSD, which was made in September, 2001, for the purpose of determining whether MSD could provide appropriate educational services to the Student;
- E. The Student's November 19, 2001, IEP (R Exh. 21);

F. The Service Plans prepared by the District after November 16, 2001, when the Parents elected to home school the Student;

G. The Student's May 14, 2002, Evaluation, which was prepared by MSD and the District (R Exh. 43);

H. The Student's July 15, 2002, IEP (R Exh. 50).

102. The following IEPs which were prepared by and/or accepted by the District were reasonably calculated to provide the Student with educational benefit and FAPE and met the requirements of the IDEA and State Plan:

A. The Student's ISD-prepared December 6, 2000, IEP (R Exh. 6), which was accepted by the District;

B. The Student's November 19, 2001, IEP (R Exh. 21); and,

C. The Student's July 15, 2002, IEP (R Exh. 50).

103. The IDEA regulations and the State Plan set out criteria to guide school districts in their determination of the appropriate placement in the least restrictive environment. These criteria are as follows:

A. The IDEA regulations, 34 C.F.R. § 300.552 state the following with respect to the educational placement of child with a disability:

“§ 300.552 Placements

In determining the educational placement of a child with a disability, . . . each public agency shall ensure that –

(a) The placement decision –

(1) Is made by a group of persons including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and,

(2) Is made in conformity with the LRE provisions of this subpart including §§ 300.550–300.554;

(b) The child's placement –

(1) Is determined at least annually;

(2) Is based on the child's IEP; and,

(3) Is as close as possible to the child's home.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and,

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.”

B. The State Plan sets forth the State's implementing regulations regarding placements at page 37, as follows:

"Placements (34 CFR 300.552)

In determining the educational placement of a child with a disability, . . . , each public agency shall ensure that the placement decision is made by the IEP team that is knowledgeable about the child, the meaning of the evaluation data, and the placement is determined at least annually, si based on the child's IEP, and is as close as possible to the child's home.

Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

Each year the public agency, through the IEP process, shall review/revise a child's IEP and subsequently make a placement decision for each student with a disability served by the public agency. The public agency must reach the placement decision from the assumption that a student with a disability should be educated with peers who do not have a disability unless the needs of the student with a disability require other arrangements. The public agency must be able to justify the placement decision in accordance with a two-part inquiry:

- A. Whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily; if not, then;
- B. Whether the child has been integrated to the maximum extent appropriate.

The following factors shall be considered as a part of the two-part inquiry:

- A. The curriculum and goals of the regular education class (i.e. factors which document a need for specially designed materials, supplies or equipment or significant modifications to the regular curriculum which would have an adverse affect on the educational program for other students in the class);
- B. The sufficiency of the district's efforts to accommodate the child with a disability in the regular class (i.e. description of modifications which have been attempted/resources which have been committed and the student centered results which were observed or a description of the modifications considered but rejected and the basis for the rejection);
- C. The degree to which the child with a disability will receive educational benefit from [the] regular classroom (i.e. consideration of the potential positive effects

with respect to cognitive, academic, physical, social or other areas of development);

- D. The effect the presence of a child with a disability may have on the regular classroom environment and on the education that the other students are receiving (i.e., description of potential harmful effects for the student with a disability or disruptive effects for students without disabilities); and,
- E. The nature and severity of the child's disability (i.e., factors which support a need for alternative instruction which cannot be achieved in the regular class such as extreme distractability, diverse learning styles, inability to engage appropriately with other students in academic or social interactions)."

104. The Least Restrictive Environment ("LRE") requirements of the IDEA require that "to the maximum extent appropriate, children with disabilities ... are educated with children who are nondisabled; and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (34 C.F.R. § 300.550; 20 U.S.C. 1412(a)(5)). The Eighth Circuit in *Independent School District No. 284 v. A.C.*, 258 F.3d 769 (8th Cir 2001) provides guidance as to the meaning of the mainstreaming requirement:

"The District also argues that the IDEA's preference for mainstream placements counsels against placing A.C. in a residential facility. Although our cases have placed emphasis on this statutory preference, see, e.g., *Springdale School Dist. No. 50 of Washington County v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982)(classing the preference among the "primary directives" of the IDEA); *S.D.*, 88 F.3d at 561 (calling it a "strong preference"), we do not believe it is implicated here. The statute requires mainstreaming only "to the maximum extent **appropriate**," not to the maximum extent possible. 20 U.S.C. C 1412(5)(A). As the Supreme Court explained in *School Committee of the Town of Burlington, Mass. v. Dept. of Ed. of Mass.*, 471 U.S. 359, 373 (1985), in crafting this language "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." (emphasis added).

Thus, the IDEA's "preference for mainstreaming is not an absolute commandment." *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir 1995); *M.L. v. Federal Way School District*, 341 F.3d 1052, 1067 (9th Cir 2003) and a school district is not required to actually implement supplemental services before choosing an alternative to inclusion of the Student in the regular education classroom. *Poolaw, supra.*, 67 F.3d 830, 835. Furthermore, "a school district may, without running afoul of the IDEA, rely upon the reports of another school district when developing its own IEP for a [disabled] child as long as the information relied upon is still relevant." *Poolaw, supra.*, 67 F.3d 830, 835.

105. With respect to the District's November 19, 2001, placement proposal, "Separate School Setting":

A. The District's determination that the education of the Student in a regular education classroom, with the use of supplementary aids and services, could not be achieved satisfactorily in the District was appropriate and met the requirements of the IDEA and State Plan.

B. The District's determination that its proposed placement, Separate School Setting, would integrate the Student to the maximum extent appropriate, was appropriate and met the requirements of the IDEA and State Plan.

C. The factors considered by the District in reaching its November 19, 2001, placement proposal, are supported by the record; were appropriately considered; and, met the requirements of the IDEA and State Plan.

D. The proposed placement for the Student of Separate School Setting was appropriate; was reasonably calculated to provide the Student with an educational benefit; provided the Student with FAPE; and, met the requirements of the IDEA and State Plan.

106. With respect to the District's July 15, 2002, placement proposal, Separate School Setting:

A. The District's determination that the education of the Student in a regular education classroom, with the use of supplementary aids and services, could not be achieved satisfactorily in the District was appropriate and met the requirements of the IDEA and State Plan.

B. The District's determination that its proposed placement, Separate School Setting, would integrate the Student to the maximum extent appropriate, was appropriate and met the requirements of the IDEA and State Plan.

C. The factors considered by the District in reaching its July 15, 2002, placement proposal, are supported by the record; were appropriately considered; and, met the requirements of the IDEA and State Plan.

D. The proposed placement for the Student of Separate School Setting was appropriate; was reasonably calculated to provide the Student an educational benefit; provided the Student with FAPE; and, met the requirements of the IDEA and State Plan.

107. The placement of the Student in a general education classroom, even with an interpreter, as requested by the Parents would be an inappropriate placement for the Student.

108. In order to be an appropriate placement in the least restrictive environment, the Student requires, because of her disability, an educational program which allows her to freely participate in unaided communication with her teachers and her peers. Placement of the Student in a regular education classroom, even with a deaf interpreter, without the presence of a substantial number of signing peers with whom the Student can communicate through her language and mode of

communication (ASL), constitutes a more restrictive environment for the Student than a placement in a Separate Educational Setting.

109. The Hearing Panel has no legal authority to require a public school system in another state to accept and educate the Student. Likewise, the Hearing Panel has not legal authority to require a public school district in Missouri, which is not a party to this due process proceeding, to accept and educate the Student.

III. DECISION

110. Issue No. 1: Whether the School District has provided the Student with a free, appropriate public education since the Student was enrolled in the District on or about the beginning of school year 2001-02?

The Parents did not provide evidence or examples of any actions by the District that they contended failed to provide the Student with a free appropriate public education, other than the District's proposed placement of the Student in a Separate School Setting and its administrative decision to provide the required special education and related services to the Student at the Missouri School for the Deaf in Fulton, Missouri. In particular, the Parents have not argued or contended that: (1) the IEP documents prepared by the Student's IEP team were not reasonably calculated to provide the Student with FAPE; (2) the evaluations of the Student were incorrect, inappropriate or procedurally flawed; (3) the Service Plans prepared for the Student after the Parents decided to home school her were in any way inappropriate or procedurally flawed; or, (4) that the District engaged in any procedural violation of the IDEA or the State Plan.

Having thoroughly reviewed the record, including the documentary evidence admitted into the record, the Hearing Panel finds that the Student has been, and is being provided FAPE by the District, in that the District: (a) has followed the procedures of the IDEA and State Plan; and, (b) the IEPs which have been developed by and/or accepted by the District have been reasonably calculated to enable the Student to receive educational benefits.

111. Issue No. 2: Whether the proper educational placement for the Student is at the Missouri School for the Deaf?

The question presented by this issue is really whether the District's proposed placement of Separate School Setting and its administrative decision to provide the required special education and related services to the Student at the Missouri School for the Deaf were appropriate?

The Student is a profoundly deaf child. The Student is ten years old. Her present level of educational performance in the areas of language development, reading and writing are at the pre-kindergarten or kindergarten level, or the four to five year-old age level. The Student's ASL abilities are emerging, however she is unable to meaningfully communicate with her parents, teachers or peers using ASL alone. Rather, the Student supplements her meager ASL abilities with gestures and expressions to communicate her needs and feelings.

The District is small, with just three hundred sixty-nine (369) students this school year according to the Missouri School Directory. The District has no other deaf or hard of hearing

students. The District has no staff members or students who are able to communicate in ASL. The closest Missouri school district which has a deaf education program taught by a certified teacher of the deaf and hard of hearing is located in St. Joseph, Missouri, approximately sixty (60) miles to the south of the District.

Prior to moving to the District in the Summer of 2001, the Student had received special education services in a self-contained public pre-school classroom for at least one year in Louisiana and had received two years in the residential education program at ISD. The Parents consented to both of these placements.

When the Student moved to the District in the late Summer of 2001, the District followed the requirements for the receipt of an out-of-state special education transfer student. In so doing, the District obtained the Student's educational records from the Shenandoah District in a timely manner and reviewed and accepted the Student's most recent evaluation and IEP, which had been prepared by ISD, which was entirely proper under the IDEA regulations, the State Plan and case law. See: *Poolaw, supra.*, 67 F.3d 830, 835. The IEP, with which the Parents agreed, provided for a placement in a residential education program at ISD due to the Student's need for a total education program with the use of ASL to promote her language development. (R Exh. 6, p 24). The IEP further specified that the Student's IEP team, which included her Parents, had determined that she could not be integrated into a general education setting because she had limited language and communication skills and would not be able to communicate with her hearing peers. (R Exh. 6, p 24). No probative evidence was presented at the hearing that demonstrated that the Student's educational needs have changed appreciably from those needs reflected in the ISD IEP which was approved by the Parents and later considered and accepted by the District.

Following acceptance of the ISD Evaluation and IEP, the District began researching possible placement options. District personnel contacted and consulted with ISD, MSD and area school districts to ascertain all of the possible placement options for the Student. When the IEP meeting was held on September 7, 2001, the Parents proposed that the Student should be placed in a first or second grade regular education classroom in the District with the assistance of a sign interpreter. That placement option was appropriately rejected by the District.

On October 8, 2001, the Student was admitted to MSD for evaluation. She was accepted by MSD and remained at MSD in its residential educational program until November 16, 2001, the beginning of the Thanksgiving Holiday break. At the beginning of the holiday break, the Parents picked her up from MSD and she did not thereafter return.

On November 19, 2001, after appropriate notice, the District conducted an IEP meeting for the Student to review and revise her IEP. During this meeting the Parents again stated that they desired to have the Student placed in a regular education classroom in the District with a sign interpreter to assist her. This placement option was appropriately rejected by the District. After consideration of the Student's most recent evaluation, MSD's recommendation, the Student's present level of performance and the criteria set forth in the State Plan, and consistent with the IDEA and State Plan, the District proposed that the Student be placed in a Separate School Setting. This placement was appropriate and met the requirements of the IDEA and State Plan. The District further administratively decided that the location of the Student's placement

be at MSD. MSD is certainly able to implement the Student's IEP and to provide the Student with FAPE. At this meeting the Parents stated that if the District did not agree with their proposed placement they would withdraw the Student from the District and home school her.

Following this meeting, the District sent out a Notice of Action which proposed the Separate School Setting placement with a location at MSD. The Parents withdrew the Student from the District and began to home school her. Thereafter, the District met with the Parents, prepared a proportionate share Service Plan and hired Tina Murdoch to provide services to the Student pursuant to the Service Plan, all of which was in compliance with the IDEA and the State Plan.

In May, 2002, the Student was again evaluated by MSD, with the consent of her Parents. This evaluation found that the Student: (1) was functioning in the average range of nonverbal cognitive ability; (2) was delayed in her visual-motor perception skills which appeared to be a result of lack of experience to develop the skills appropriately; was at the pre-kindergarten/early kindergarten level for academic readiness; (3) had only basic writing skills; and, (4) had minimal language skills for what would be expected of a deaf student her age.

These results clearly show that the Student needs to be in a formal special education program. More specifically, it is the determination of the Hearing Panel that in order for the Student to progress, and hopefully catch up with her hearing and non-hearing peers, she needs to be placed in a Separate School Setting, the placement proposed by the District so she can be immersed in language development in a sign-enriched environment. The Hearing Panel further believes that the Missouri School for the Deaf is an appropriate location for the Student because it can provide a sign-enriched environment with a "critical mass" of non-hearing peers who use ASL as their principal language and mode of communication. Until the Student becomes sign proficient and substantially improves her language, writing, reading and communication skills, inclusion in any regular education classroom in the District, or elsewhere, with or without a sign interpreter, will not be an appropriate placement.

The Hearing Panel has not made this decision without due consideration for the wishes of the Parents and Grandparents. There is no question that the Student is surrounded by a caring and supportive family who want her to be successful in school and in life. However, there is also no question that the Student's disability requires that an immediate and substantial effort be made to infuse her with the language and communication skills she needs to academically flourish. The educational environment which is required for that effort is simply not available in Rock Port, Missouri because, try as it might, the District can not obtain one of the most important ingredients for the program – hearing impaired peers – who can directly communicate with the Student in her language and in her mode of communication. If the Student can not communicate in the educational environment, in her language/mode of communication, the environment becomes more restrictive rather than the least restrictive environment, even if the educational environment is located close to the Student's home.

Accordingly, the Hearing Panel finds that the placement proposed by the District, Separate School Setting, located at MSD, is appropriate for the Student and is reasonably calculated to provide the Student a free appropriate public education in the least restrictive environment. It is the hope of the Hearing Panel that the Student's Parents will work with the

District and MSD to help provide the Student with an appropriate educational environment to help her progress academically.

112. Remedy No. 1: Change the location of the Student's placement to a separate educational setting at the Iowa School for the Deaf ("ISD").

This proposed remedy is rejected for several reasons.

First, the Hearing Panel has determined that the placement proposed by the District, Separate School Setting, and the location of that placement, MSD, are appropriate. The factual and legal circumstances of this case are very similar to the case of *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir 1995). In *Poolaw*, the Ninth Circuit found that the placement of a profoundly deaf student in a state school for the deaf was appropriate, even though it was located two hundred eighty (280) miles from the student's home. The Court approved the placement because the mainstream placement was unable to provide the student with the intensive ASL instruction that he needed to acquire communication skills. *Poolaw, supra.*, 67 F.3d 830, 836.

Second, while ISD is certainly closer, the credible evidence on the record indicates that ISD does not accept out-of-state students from states, like Missouri, which have a school for the deaf. Even if ISD did accept students from Missouri, this Hearing Panel does not have the legal authority to require the District, or the State of Missouri for that matter, to place a Missouri public school student in a public educational institution operated by another state, without clear evidence on the record that the student has already been accepted by the foreign state's school. Nor is such a decision well advised because it could leave the District (or the State) in legal limbo if the foreign state refuses to accept the student.

Third, we have no evidence on the record to show that ISD is able to implement the Student's current IEP. While we can assume ISD would be able to provide the needed special education and related services to the Student, we can not make a placement decision without hard evidence on the record.

Fourth, there is a significant legal question whether the decision to "place" the Student at MSD versus ISD was an administrative decision to be made by the District alone, or a decision to be made by the Student's IEP team. The Hearing Panel does not have to reach this issue because the Parents have not met their burden to show that ISD is an appropriate placement for the Student and has accepted the Student.

113. Remedy No. 2: Change the placement of the Student to a general education classroom in the Maryville R-II School District with the assistance of a sign interpreter.

This is rejected for the same reasons set forth above with respect to Remedy No. 1.

IV. ORDER

The request for due process is dismissed.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, Section 536.010 *et seq.* RSMo.

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated: October 28, 2003

Ransom A Ellis, III
Hearing Chairperson

Jean Adams
Hearing Panel Member

- I disagree with the decision of the Hearing Panel.
- I do not believe that the district went as far as it could to alleviate its own financial strain of sending [the Student] to Iowa School for the Deaf.
- I also believe that given their obvious limitations, the family could not fairly represent themselves.
- This family did not have fair and equitable access to their rights to Due Process.

Marilyn Bohnsack
Hearing Panel Member

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

Parents

Peter G. Yelkovac
Tueth Keeney Cooper Mohan
& Jackstadt
425 S. Woods Mill Road, Suite 300
St. Louis, MO 63017

Pam Williams
Special Education Legal Services
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, MO 65102-0480

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 28th day of October, 2003.

Ransom A Ellis, III
Hearing Chairperson